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In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
PETITIONER

v.

RALPH P. FORBES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, when providing news-related programming to the communities they serve, broadcast stations licensed to governmental entities are subject to First Amendment limitations inapplicable to broadcast stations licensed to private entities.

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

The Federal Communications Commission (FCC) is the agency to which Congress has delegated the authority to regulate the broadcast industry under the Communications Act of 1934. See 47 U.S.C. 151 *et seq.* Congress and the FCC have committed substantial public resources—in the form of frequency allocations and federal funds—to the development of noncommercial educational broadcasting (commonly referred to as "public broadcasting"). In so doing,

Congress and the FCC have acted on the premise that the employees of all public broadcasting stations, of which more than two-thirds are licensed to state entities, will exercise the same editorial discretion over the content of their programming as their counterparts in private commercial broadcasting. In holding that the First Amendment constrains the editorial decisions of a state-entity licensee, however, the court of appeals' decision in this case threatens the premise underlying the federal regulatory scheme. The Commission and the United States therefore have a substantial interest in the outcome of this case.

STATEMENT

1. a. Before passage of the Radio Act of 1927, ch. 169, 44 Stat. (Pt. 2) 1162, "the allocation of [broadcasting] frequencies was left entirely to the private sector, and the result was chaos." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375 (1969). Congress recognized that unless the federal government regulated access to the airwaves, each speaker would be drowned out by a "cacophony of competing voices." *Id.* at 376. Congress thus enacted the Communications Act of 1934, ch. 652, 48 Stat. 1064, "to protect the public interest in communications," *Scripps-Howard Radio Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress assigned enforcement responsibility under this new regulatory scheme to the FCC.

Broadcasters are granted station licenses for terms of up to eight years. 47 U.S.C. 307(c) (to be codified at Supp. II 1996). The Commission may grant

and subsequently renew such licenses only after finding that doing so will serve the public interest, convenience or necessity. 47 U.S.C. 303, 307(a) and (c), 309(k) (to be codified at Supp. II 1996). The "policy of the Act is clear that no person is to have anything in the nature of a property right as the result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

A central element of this regulatory scheme is the responsibility of the individual licensee, whether a governmental or private entity, to act as a public trustee. A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a limited and valuable part of the public domain" and, in return, assumes a duty to serve the public interest. See *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). As one sponsor of a predecessor to the Communications Act observed 70 years ago, "[t]he right of the public to service is superior to the right of any individual * * *. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White). Similarly, in amending the Communications Act in 1959, Congress reaffirmed the public trust concept as the animating principle underlying the Act: "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959); accord *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 375-377; *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

The "ability of the licensee to render the best practicable service to [its] community" is crucial to the Commission's licensing decisions. *Sanders Bros.*, 309 U.S. at 475. Specifically, a broadcaster must direct issue-responsive programming to the identified needs of its community. See *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsid. denied, 104 F.C.C.2d 357 (1986), aff'd in relevant part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, reconsid. granted in part, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Failure to meet that requirement can lead to the denial of a broadcaster's renewal application. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975).

Each licensee must itself undertake, and therefore may not delegate, the "primary duty and privilege to select the material to be broadcast to his audience." *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2311-2312 (1960); see also *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 599-600 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). The FCC "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee," *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967), and has expressed strong disapproval of any decision by a licensee to relinquish control over portions of its programming. See, *e.g.*, *Trustees of the University of Pennsylvania*, 69 F.C.C.2d 1394 (1978); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558 (1976), rev'd on other grounds, 581 F.2d 917 (D.C. Cir. 1978); *Carol Music, Inc.*, 37 F.C.C. 379, 380, 400 (1964).

b. "The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." *FCC* v. *League of Women Voters*, 468 U.S. 364, 367 (1984); see also S. Frost, *Education's Own Stations* 464 (1937). Between 1921 and 1936, the federal government issued approximately 200 radio broadcast licenses to educational institutions, many of which were public. See *id.* at 2-5. When the FCC first reserved frequencies for noncommercial educational television use, it assumed that many public broadcasting facilities would be licensed to and financed by state and local governmental entities. See *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock). Approximately two-thirds of noncommercial educational broadcast stations are now licensed to governmental entities. See *FCC* v. *League of Women Voters*, 468 U.S. at 393 n.22.[1]

With few exceptions, noncommercial stations are subject to the same regulatory standards and require-

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[1] Since 1962, the federal government has provided substantial government funding for noncommercial educational broadcasting. See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64; Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; see also *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 292 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). Although governmental entities typically seek licenses to operate noncommercial educational stations, they may, and occasionally do, operate commercial stations as well. See, *e.g.*, *Applications of Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd. 481 (1993), aff'd mem. *sub nom. Iowans for WOI* v. *FCC*, 50 F.3d 1096 (D.C. Cir. 1995); G. Gordon, *Educational Television* 9 (1965).

ments as commercial stations.[2] In particular, the FCC has addressed, and has specifically rejected, the position that the editorial decisions of state-entity broadcast licensees are subject to greater legal constraints than the decisions of any other licensee. The Commission reasoned that, because there is no constitutional right of access to a broadcast station, and because Congress refused to treat broadcasters as common carriers, state-entity licensees have both the same public trustee responsibilities and the same editorial discretion as private licensees. For that reason, the Commission concluded that the "public forum doctrine" is not applicable to, and the First Amendment does not restrict, a state-entity licensee's choice and selection of programming. See *Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296, 1303 n.12 (1979); *City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169, 170 (1975).

2. This case concerns the constitutionality of a decision by the Arkansas Educational Television Network (AETN) to sponsor and broadcast a 1992 debate between the two leading candidates for a seat in the United States Congress. Petitioner Arkansas Educational Television Commission, an Arkansas state agency, operates AETN. AETN did not invite respondent Ralph P. Forbes, an independent candidate for the congressional seat at issue, to participate in the debate. That decision rested not on any disagree-

[2] See *FCC* v. *League of Women Voters*, 468 U.S. at 367; *Muir*, 688 F.2d at 1040; *Accuracy in Media*, 521 F.2d at 291. The exceptions are a ban on supporting or opposing any candidate for office; a requirement that such stations operate on a noncommercial, nonprofit basis; and a general prohibition against selling time or accepting advertising. See 47 U.S.C. 399, 399b; 47 C.F.R. 73.621.

ment with respondent's political viewpoint, but on his lack of public support, the absence of public interest in his candidacy, and his negligible chance of electoral success. See Pet. 2-3, 6, 14-15; Pet. App. 8a-9a.

Although candidates seeking airtime on any broadcast station may pursue various statutory remedies under the Communications Act by filing a complaint with the FCC, see pp. 15-17, *infra*, respondent filed no such complaint and instead sought relief directly in federal district court, asserting, among other things, a First Amendment right to participate in the debate. The district court dismissed the suit for failure to state a legally valid claim, and respondent unsuccessfully sought preliminary injunctive relief in the court of appeals. See Pet. App. 43a-44a.

Sitting en banc to hear respondent's appeal on the merits, however, the Eighth Circuit remanded the case to the district court for further proceedings. Pet. App. 25a-42a (*Forbes I*). It held that AETN is a state actor, that it "is faced with constraints not shared by other television stations," that respondent had "a qualified right of access created by [petitioner's] sponsorship of a debate," and that petitioner "must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Id.* at 33a-34a. The court suggested that whether or not petitioner's "reason" was "strong enough" turned on whether the debate should be characterized as a "nonpublic" or, alternatively, as a "limited public" forum, an issue that the court remanded to the district court. *Id.* at 34a-37a. This Court denied certiorari. 115 S. Ct. 500 (1994).

On remand, the district court found as a matter of law that the debate was a nonpublic forum. See Pet. App. 6a. The court also submitted to the jury special

interrogatories asking whether the decision to exclude respondent from the debate was influenced by political pressure or disagreement with respondent's views. The jury answered those questions in the negative. See *id.* at 7a-9a. Based on those findings, the district court ruled for petitioner.

The court of appeals reversed. Pet. App. 1a-18a (*Forbes II*). The court accepted the jury's determination that the decision to exclude respondent from the debate was viewpoint-neutral and free of influence from political pressure. See *id.* at 7a-9a. Indeed, it specifically found that the decision to exclude petitioner "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nonetheless, although the court acknowledged (*id.* at 15a) that petitioner had never intended to open the debate to all legally qualified candidates, it held that the debate was nonetheless a "limited public forum" and that petitioner was without authority to exclude peripheral candidates: "Whether [respondent] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Id.* at 14a-16a. Finding that petitioner's reason for excluding respondent from the debate was "neither compelling nor narrowly tailored," the court reversed and remanded for an assessment of damages. *Id.* at 17a-18a.

On September 25, 1996, Justice Thomas denied petitioner's application to stay enforcement of the Eighth Circuit's decision pending the filing of a petition for certiorari. See Pet. 8. On September 26, 1996, the Eighth Circuit, in denying petitioner's motion to stay its mandate, issued a one-paragraph clarification of

its earlier decision. Pet. App. 19a. The court stated that petitioner remains free, "to the extent provided by law," to cover "bona fide news events," including candidate debates, that are "organized by people or groups other than [petitioner]." *Ibid.* The court added that its earlier decision did not necessarily require petitioner to invite write-in candidates to participate in any debate that it sponsored. *Ibid.*

DISCUSSION

The court of appeals' decision creates a circuit conflict on a question of substantial national importance: whether the editorial decisions of state-entity broadcast licensees are subject to stringent First Amendment constraints inapplicable to other broadcast licensees. This Court should grant certiorari to resolve that conflict and preserve the editorial discretion that state-entity licensees have traditionally exercised over the content of their news programming.

1. The court of appeals held that a state-entity licensee, when sponsoring a political debate for the benefit of the viewers in its community, may not limit the participants to candidates who have demonstrated a realistic chance of electoral success, but must also invite every legally qualified candidate—no matter how peripheral—for the elective office at issue. That decision, which will undoubtedly lead many state-entity licensees to abandon their sponsorship of such debates in the future, is in direct conflict with *Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991).

In *Chandler*, Libertarian Party candidates for Georgia state office sought to enjoin a political debate

between the Democratic and Republican candidates sponsored by, and broadcast on stations licensed to, the Georgia Public Telecommunications Commission (GPTC), a state entity. The Eleventh Circuit observed that GPTC, like all other broadcast licensees, was required under federal law to serve the viewing needs of its community, and that GPTC's employees therefore had to make daily editorial decisions about programming content. 917 F.2d at 488. The court found that, although GPTC had " 'regulated content' by making a decision to air debates between candidates of the major parties," that decision was constitutionally permissible because it was reasonably designed to, and did in fact, meet GPTC's obligation to air programming "of the most interest and benefit to the citizens of Georgia." *Id.* at 489.

In this case, the Eighth Circuit acknowledged that the decision to exclude respondent from the debate was "made in good faith" and is "exactly the kind of journalistic judgment routinely made by newspeople." Pet. App. 16a. Moreover, the court accepted (see *id.* at 7a-10a) the jury's determination that that decision was not influenced by political pressure and was not "based on disagreement with [respondent's] political viewpoint." *Id.* at 9a; compare *Chandler*, 917 F.2d at 489 (GPTC's decision to exclude Libertarian candidates was "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's views") (internal quotation marks omitted). In the court of appeals' view, however, those facts are irrelevant; the "crucial fact," it held, "is that the people making this judgment were not ordinary journalists: they were employees of government." Pet. App. 16a. In so holding, the court made final its earlier decision, in *Forbes I*, to "dis-

agree with the Eleventh Circuit's conclusion [in *Chandler*] that the First Amendment was not implicated by the Georgia public television station's actions." *Id.* at 37a n.4.

The Eighth Circuit's decision is also in tension with *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). In that case, the Fifth Circuit upheld the authority of a state public broadcasting network to decide, on content-based grounds, not to broadcast a particular program. The *Muir* court rejected arguments that the state network's broadcast operations constituted a public forum for First Amendment purposes. As the court explained, "[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered." 688 F.2d at 1042.

2. In our view, the decisions of the Eleventh and Fifth Circuits in *Chandler* and *Muir* are correct, and the contrary decision of the Eighth Circuit in this case should be reversed. The political debate at issue here was not a "public forum," limited or otherwise, nor did petitioner violate the First Amendment by limiting that debate to those whose candidacies have attracted significant public support or interest.

a. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Instead, Congress relied on the diverse editorial decisions of individual broadcasters, combined with

each broadcaster's statutory duty to serve the needs of its viewing community, to ensure a rich marketplace of ideas in television broadcasting. *Id.* at 120-121. "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." *Id.* at 124-125.

Thus, "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984); accord *CBS, Inc.*, 412 U.S. at 120-121. That principle is no less applicable to state-entity licensees than to any other licensee. The Communications Act and the FCC's detailed regulatory scheme require every licensee, whether public or private, to use its own editorial discretion to serve the public interest. See pp. 3-6, *supra*. No broadcaster may cede that responsibility to members of the general public. See *CBS, Inc.*, 412 U.S. at 108-114; see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier"); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

A broadcaster's responsibility to exercise editorial control and judgment over the content of its programming is therefore inconsistent with any characterization of broadcasters, or of the programs each broadcaster airs, as "public forums." A structured debate between the two major candidates for a given political office, sponsored and aired by a state-entity licensee, is a news program designed to meet the

viewing needs of the licensee's broadcast community. See generally 47 U.S.C. 315(a)(1)-(4); *King Broadcasting Co.* v. *FCC*, 860 F.2d 465 (D.C. Cir. 1988); *In re Requests of Fox Broadcasting Co.*, 11 F.C.C. Rcd. 11,101 (1996). A news program can in fact meet those needs only if, as Congress intended, the sponsoring broadcaster exercises its journalistic discretion to exclude material that would detract from the program's overall effectiveness. Such programs are not, and cannot be equated with, government property opened up for untrammeled expression by a broad variety of individual speakers, cf. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981), and they therefore do not create a right of access to every peripheral candidate who wishes to appear on television.[3]

Indeed, carried to its logical conclusion, the court of appeals' contrary analysis would appear to apply not just to candidate debates, but to a broad range of other programming that has traditionally fallen within a broadcaster's editorial discretion. For exam-

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[3] In any event, petitioner's viewpoint-neutral decision to exclude non-major candidates was reasonably calculated to preserve the character of the debate as an efficient means for community viewers to learn the positions of the principal candidates. For that reason, even if the debate could properly be characterized as a limited public forum, which it cannot, petitioner's decision to exclude respondent would be constitutional. See *Rosenberger*, 115 S. Ct. at 2517 (speech restrictions in limited public forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum") (internal quotation marks omitted).

ple, any state-entity licensee that airs an interview with a political candidate as part of its nightly news broadcast could arguably be required, under the Eighth Circuit's reasoning, to air a separate interview of every rival candidate who seeks equal public exposure.[4] Indeed, taken at face value, the Eighth Circuit's decision would seem to grant rights of television access not just to aggrieved candidates, but to anyone with a view about a matter of public controversy. If "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a), then, arguably, anyone could demand airtime to respond to the views

[4] The Eighth Circuit recently agreed to en banc consideration of whether a state-entity licensee may sponsor and air news programs featuring interviews with the "major candidates" for political office. See *Marcus* v. *Iowa Pub. Television*, initial hearing en banc granted, No. 96-3645SIDM (Dec. 10, 1996). A divided panel of the Eighth Circuit had earlier denied preliminary injunctive relief to non-major candidates who sought to appear on those programs; it reasoned that, even if the programs at issue are limited public forums, the state-entity licensee likely has a "compelling interest" in "limiting access to newsworthy candidates." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1144 (1996). In analysis that a dissenting judge characterized as an effort "to distinguish the indistinguishable," *ibid.* (Beam, J., dissenting), the panel majority explained its tentative departure from the decision in this case on the ground that, "[u]nlike 'viability,' which is ultimately for the voters to decide, 'newsworthiness' is peculiarly a decision within the domain of journalists." *Id.* at 1142. Because the Eighth Circuit is unlikely to overrule its decision in the present case, this Court should grant certiorari to resolve the conflict between the Eighth and Eleventh Circuits on the issue presented; in the alternative, we suggest that the Court hold this case pending the Eighth Circuit's disposition of *Marcus*.

expressed by anyone else interviewed in a televised news program sponsored by a state-entity licensee.

Even if confined to the context of candidate debates, however, the court of appeals' decision will harm public awareness of, and discussion about, political contests throughout the United States. The value of a debate does not necessarily increase with the number of participants; as common sense suggests, the inclusion of too many participants could make almost any debate unwieldy and uninformative. As a practical matter, the court of appeals' decision could well lead many state-entity licensees simply to abandon plans to sponsor candidate debates. That is not just an abstract concern. As petitioner observes (Pet. 11), the Nebraska Educational Telecommunications Network recently canceled a senatorial debate because it feared that, under the decision below, it would have to invite all minor candidates who wished to appear alongside the major contenders. Such consequences are unfortunate: not just for state-entity licensees themselves, but, more significantly, for the innumerable American citizens who rely on such licensees to sponsor televised debates among the principal candidates for federal, state, and local offices.

b. The court of appeals' decision appears to rest, at least in part, on the concern that state-entity licensees would exclude minor candidates from televised debates for impermissible reasons. See, *e.g.*, Pet. App. 4a (*Forbes II*) (permitting state-entity licensee to exclude non-major candidates from debate would "place too much faith in government"); see also *id.* at 34a (*Forbes I*) (expressing concern that state-entity licensee might "exclude all Republicans, or all Methodists, or all candidates with a certain point of view"). But Congress has already addressed that specific

concern—which, for the reasons explained above, is not of constitutional dimension in any event—in a detailed statutory scheme.

Although the Communications Act leaves most political programming to each broadcaster's own editorial discretion, it does give all legally qualified candidates the right to make use of broadcast stations in certain circumstances. Specifically, Section 312(a)(7) confers on all federal candidates a limited right of "reasonable" access to the airwaves, and Section 315 provides that if any legally qualified candidate for public office "use[s]" a broadcast station, other candidates for the same office must be given an "equal opportunit[y]" to use that station as well. See 47 U.S.C. 312(a)(7), 315; see generally *CBS, Inc.*, *supra*; *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 422-424 (D.C. Cir. 1980).

The Act generally exempts bona fide news coverage from the equal opportunity requirement. See 47 U.S.C. 315(a)(1)-(4). The Commission has therefore held that airing a candidate debate usually does not obligate a broadcaster to provide equal opportunities to excluded candidates. See *Aspen Institute*, 55 F.C.C.2d 697 (1975), aff'd *sub nom. Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983); see also *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. 1976), cert. denied, 430 U.S. 955 (1977). Nonetheless, where a broadcaster does decide to exclude legally qualified candidates from a televised debate that it sponsors, the exemption applies only if that decision rests on the broadcaster's good-faith journalistic judgment and not on a desire to promote or suppress the views of a particular candidate. See

generally *Chisholm* v. *FCC*, 538 F.2d at 358-360; *Henry Geller*, 95 F.C.C.2d at 1242; *Cyril E. Sagan*, 1 F.C.C. Rcd. 10 (1986); *Brown for President Comm.*, 75 F.C.C.2d 609, 613-614 (1980); *Andrew J. Watson*, 26 F.C.C.2d 236 (1970); *Constitutional Party*, 14 F.C.C.2d 255 (Broadcast Bureau), reh'g denied, 14 F.C.C.2d 861 (1968); *Conservative Party*, 40 F.C.C. 1086 (1962).

In sum, Sections 312(a)(7) and 315, together with the Commission's detailed implementing regulations, ensure that all legally qualified candidates will have fair and reasonable opportunities to present their views on television. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd. 678 (1991), reconsid. denied, 7 F.C.C. Rcd. 4611 (1992). Respondent was free to pursue his rights under those provisions by filing a complaint with the FCC, a procedure that he chose to forgo. See Pet. App. 31a-32a. Any future candidate, however, may invoke those statutory remedies to challenge an unfair denial of access to the airwaves. The availability of those remedies belies the court of appeals' concern that state-entity licensees could irremediably deny candidates a full and fair opportunity to present their messages directly to the viewing public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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